Supreme Court, U.S.
FILED
MAY 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-239

(2)

in the Supreme Court of the United States

OCTOBER TERM, 1985

CARL H. HOFFMAN and
CARL H. HOFFMAN, P.A.

Petitioners,

vs.

DAVID SYLVA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

EVELYN LANGLIEB GREER
9595 North Kendall Drive
Miami, Florida 33176
(305) 274-8500
Counsel for Respondent

34pp

QUESTIONS PRESENTED

I

MAY A COURT OF APPEALS, HAVING SET ASIDE AN UNFAIR BUT CONSUMMATED CLASS ACTION SETTLEMENT AND CONFRONTED BY THE REFUSAL OF THE DISTRICT COURT TO REQUIRE RESTITUTION, ENFORCE ITS MANDATE BY ORDERING THE DISTRICT COURT TO ORDER IMMEDIATE RESTITUTION OF SETTLEMENT PROCEEDS AND ATTORNEYS FEES.

II

MAY THE COURT OF APPEALS, CONFRONTED BY A CLASS ACTION LEAD COUNSEL'S CONFLICT WITH AN UNREPRESENTED MINORITY CLASS, HIS MANEUVERING TO KEEP $750,000 IN ATTORNEYS FEES AND HIS REFUSAL TO COMPLY WITH THE MANDATE, ENFORCE ITS MANDATE BY ORDERING THE DISTRICT COURT TO REMOVE LEAD COUNSEL AND APPOINT NEW COUNSEL FOR THE PLAINTIFF CLASS.

III

MAY THE COURT OF APPEALS, CONFRONTED BY THE DISTRICT COURT'S REFUSAL TO COMPLY WITH BOTH THE LETTER AND THE SPIRIT OF ITS MANDATE, ENFORCE ITS MANDATE BY MANDAMUS.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
REASONS FOR NOT GRANTING CERTIORARI	6
I	
THE COURT OF APPEALS, HAVING SET ASIDE AN UNFAIR BUT CONSUMMATED CLASS ACTION SETTLEMENT AND CONFRONTED BY THE REFUSAL OF THE DISTRICT COURT TO REQUIRE RESTITUTION, MAY ENFORCE ITS MANDATE BY ORDERING THE DISTRICT COURT TO ORDER IMMEDIATE RESTITUTION OF SETTLEMENT PROCEEDS AND ATTORNEYS FEES.	6

TABLE OF CONTENTS (Continued)

Page

II

THE COURT OF APPEALS, CONFRONTED BY LEAD COUNSEL'S CONFLICT WITH AN UNREPRESENTED MINORITY CLASS, HIS MANEUVERING TO KEEP $750,000 IN ATTORNEYS FEES AND HIS REFUSAL TO COMPLY WITH THE MANDATE, MAY ENFORCE ITS MANDATE BY ORDERING THE DISTRICT COURT TO REMOVE LEAD COUNSEL AND APPOINT NEW COUNSEL FOR THE PLAINTIFF CLASS. 6

III

THE COURT OF APPEALS, CONFRONTED BY THE DISTRICT COURT'S REFUSAL TO COMPLY WITH BOTH THE LETTER AND THE SPIRIT OF ITS MANDATE, MAY ENFORCE ITS MANDATE BY MANDAMUS. . . 9

A. MANDAMUS 9

B. SUPERVISORY POWERS 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F.2d 1045 (2d Cir.) *cert denied* 414 U.S. 1092, 94 S. Ct. 722, 38 L.Ed.2d 549 (1973) 13

Cherokee Nation v. Oklahoma, 461 F.2d 674 (10th Cir.), *cert. denied*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489 (1972) 10

Foster v. Boise-Cascade, Inc., 420 F. Supp 674 (S.D. Tex. 1976), *aff'd* 577 F.2d 335 (5th Cir. 1978) 14

General Atomic Co. v. Felter, 436 U.S. 493, 56 L.Ed.2d 480, 98 S.Ct. 1939 (1978) 12

Nixon v. Richey, 513 F.2d 430, (D.C. 1975) *affd on other grds*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) 10

Pacific Tel & Tel Co. v. Public Util. Comm., 443 U.S. 1301, 61 L.Ed.2d 880, 100 S.Ct. 1 (1979) 7

Piambino v. Bailey, 610 F.2d 1306 (5th Cir. 1980) *cert denied* 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980) ..... *passim*

TABLE OF AUTHORITIES (Continued)

Page

Piambino v. Bailey,
757 F.2d 1112 (11th Cir. 1985) ..... *passim*

Reserve Min. Co. v.
Environmental Protection Agcy,
514 F.2d 492 (8th Cir. 1975) 7

Thornton v. Carter,
109 F.2d 316 (8th Cir. 1940) 10

U.S. v. Dante,
739 F.2d 547 (11th Cir. 1984) 7

U.S. v. Haley,
371 U.S. 18, 9 L.Ed.2d 1, 83 S.Ct. 11 (1962) 11

Yablonski v. UMW,
147 U.S. App. D.C. 193, 454 F.2d 1036, (1971)
cert. denied, 406 U.S. 906, 92 S.Ct. 2609,
31 L.Ed.2d 816 (1972) 10

OTHER AUTHORITIES

Rule 23,
Federal Rule of Civil Procedure 13

Rule 65
Federal Rule of Civil Procedure 4, 8, 9

No. 85-239

in the Supreme Court of the United States

OCTOBER TERM, 1985

CARL H. HOFFMAN and
CARL H. HOFFMAN, P.A.

Petitioners,

vs.

DAVID SYLVA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

This Petition for Certiorari questions whether the Court of Appeals in issuing *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1985) (Piambino II) correctly interpreted and enforced its own Mandate in *Piambino v. Bailey*,

610 F.2d 1306 (5th Cir. 1980) *cert denied* 449 U.S. 1011, 101 S. Ct. 568, 66 L. Ed.2d 469 (1980) (Piambino I). While Petitioner sets forth the bare holding of Piambino I in his Statement of the Case, the 30 page Opinion can not be reduced to a five sentence summary of holding. While the Opinion is clear, certain points are set forth herein to supplement Petitioners Statement of the Case.

As the Opinion reflects, Respondent is the Compliance Officer of the California Restitutionary Fund and Representative of its Members (the "Minority Group"), and was uninvolved in this private civil litigation until the District Court, upon petition by Lead Counsel on behalf of the Plaintiff Class, entered a Preliminary Injunction. The Injunction seized $500,000 due to be paid by Defendant Bestline Corporation to the California Restitutionary Fund and ordered such payment, and all others to become due thereafter, to be made to the Court Registry instead. The Injunction was appealed by Bestline as a violation of the Anti-Injunction Statute. Respondent did not intervene in this case until the Plaintiff Class and Bestline filed their Stipulation of Settlement, whereby they sought to dismiss the pending appeal of the Preliminary Injunction and settle the litigation with Respondent's money. The Stipulation of Settlement boldly revealed the parties' plan to keep Respondent's $500,000 and terminate the ability of Bestline to make future payments to the Fund by liquidating the company. Piambino I at 1315, 1327.

In its initial pleading, a Petition to Intervene, Respondent clearly sought return of the $500,000; subsequently, Respondent opposed the Settlement Agreement and award of attorneys fees as unfair generally and as applied to the Minority Group. Respondent

subsequently appealed the refusal of the District Court to grant intervention as well as its approval of the Settlement Agreement and attorneys fees.

Piambino I was decided February 6, 1980; subsequently, Petitioner filed a Petition for Rehearing and a Petition for Rehearing En Banc, denied May 15, 1985 and a Petition for Writ of Certiorari, denied December 1, 1980.

Piambino I severely criticized Lead Counsel for his persistent conflict of interest with the Minority Group, and criticized the District Court for failing to protect the rights of the Minority Group. The Court clearly ordered in Piambino I:

A. that Respondent be allowed to intervene. Piambino I at 1320-1324, 1334.

B. that the Settlement Agreement be vacated, because it excluded the Minority Group through misleading class notices and included the $500,000 improperly seized from the Minority Group. Piambino I at 1329-1330.

C. that the attorneys fees could not be paid, since Lead Counsel had "generated no common fund from which to pay attorney fees and expenses". Piambino I at 1330.

D. that the attorneys fees could also not be paid because Lead Counsel had an irreconcilable conflict with the Minority Group. Piambino I at 1327-1328.

E. that the Minority Group had "absolute priority to all such funds" generated in the class action due to its prior California Judgment. Piambino I at 1330.

F. that the Preliminary Injunction seizing $500,000 from the Minority Group was illegal, and that the funds had to be restored to the Registry of the Court as an improperly dissolved Rule 65(c) bond. Piambino I at 1330-1334.

The Mandate was returned to the District Court December 6, 1980, and Respondent awaited the District Court's Order implementing same. Finally, Respondent filed its Motion for Entry of Order on the Mandate (Appendix A), requesting the relief logically required by Piambino I. This Motion reflects all of the orders eventually required by Piambino II. However, after the vigorous opposition of Lead Counsel, the Motion for Entry of Order on the Mandate was denied in its entirety by the District Court.

Carl H. Hoffman and Carl H. Hoffman, P.A. are referred to herein as Petitioner; David Sylva, Intervenor and Representative of the Minority Group, is referred to herein as Respondent.

SUMMARY OF ARGUMENT

The Petition for Certiorari raises no significant issues of interpretation of the Constitution or Statutes, cites no direct decisional conflicts and raises no important issues for Supreme Court review. The Petition basically seeks review of the substantive holdings of Piambino I, wherein a Petition for Writ of Certiorari was previously denied.

The Mandate below in Piambino II does not deprive Petitioner of liberty or property without due process, but is an enforcement by the Court of Appeals of its own prior Mandate in Piambino I, which Mandate was fully litigated and appealed by Petitioner.

REASONS FOR DENYING CERTIORARI

I

THE COURT OF APPEALS, HAVING SET ASIDE AN UNFAIR BUT CONSUMMATED CLASS ACTION SETTLEMENT AND CONFRONTED BY THE REFUSAL OF THE DISTRICT COURT TO REQUIRE RESTITUTION, MAY ENFORCE ITS MANDATE BY ORDERING THE DISTRICT COURT TO ORDER IMMEDIATE RESTITUTION OF SETTLEMENT PROCEEDS AND ATTORNEYS FEES.

II

THE COURT OF APPEALS, CONFRONTED BY A CLASS ACTION LEAD COUNSEL'S CONFLICT WITH AN UNREPRESENTED MINORITY CLASS, HIS MANEUVERING TO KEEP $750,000 IN ATTORNEYS FEES AND HIS REFUSAL TO COMPLY WITH THE MANDATE, MAY ENFORCE ITS MANDATE BY ORDERING THE DISTRICT COURT TO REMOVE LEAD COUNSEL AND APPOINT NEW COUNSEL FOR THE PLAINTIFF CLASS.

Petitioner's Questions I and II object on the same grounds to two portions of Piambino II—the removal of Lead Counsel and the order of restitution. Petitioner alleges that these wrong results were achieved by the

Court of Appeals engaging in *de novo* fact finding. The Court of Appeals did not find facts, it simply enforced the "letter and spirit" of its previously fully litigated Mandate in this lengthy litigation. Piambino II at 1119-1120; *Pacific Tel & Tel. Co. v. Public Util. Comm.* 443 U.S. 1301, 1305, 61 L.ED.2d 880, 100 S. Ct. 1 (1979); *Reserve Min. Co. v. Environmental Protection Agcy*, 514 F.2d 492, 541 (8th Cir. 1975).

Respondent originally intervened in this matter in February, 1977 to recover funds improperly seized by a Preliminary Injunction and to represent the rights of the Minority Group. In March, 1977, the District Court held a lengthy hearing on the objections to the Settlement Agreement where both Petitioner and Respondent had a full and free opportunity to and did present and cross-examine witnesses; thereafter the District Court denied Respondent's motion to intervene and approved the settlement. These hearings and the history of this litigation were fully set forth in the 1000 page Appendix filed with Respondent's original appeal resulting in Piambino I.

The Court of Appeals, applying the appropriate "clearly erroneous" standard to the District Court's orders, reversed. *U.S. v. Dante* 739 F.2d 547, 548 (11 Cir. 1984). Quoting lengthy portions of the testimony at the hearing before the District Court, the Court of Appeals directed the relief set forth in Respondent's statement of the case, *infra* and sought the restoration of the *status quo ante*. Piambino II at 1119.

Piambino I established as "the law of the case" that Lead Counsel had a serious conflict with the Minority Group, so serious that a sub-class was created to be

separately represented by Respondent. "Much of the foregoing discussion (in Piambino I) make it clear that (the Minority Group) was not represented at all in this litigation . . . ." Piambino I at 1324.

On remand, however, Lead Counsel spearheaded a vigorous campaign to prevent enforcement of the Mandate, including opposition to Respondent's Motion for Entry of Order on the Mandate (Appendix A); opposition to Respondent's Intervention; (which intervention the District Court denied despite Piambino I's Mandate); amendment of the class definition to specifically exclude the Minority Group and opposition to restitution. Despite the Mandate, and due to Lead Counsel's efforts, Respondent could not even get the District Court to permit him to intervene to represent the Minority Group in further proceedings.

Upon Mandamus the 11th Circuit Court of Appeals was rightfully furious.

While the District Court had mechanically entered four of the five specific summary orders required by the Mandate, it had taken no steps to move the case forward, restore the Rule 65 (c) bond or deal with Respondent's claims.

Piambino II lashed out at the abuse of the class action process and directed the District Court, in minute detail, to do what Piambino I had in "letter and spirit" already directed. Piambino II did not find new facts as to Lead Counsel's conflict—his conflict was specifically a basis of reversal in Piambino I. Piambino II further did not take the plaintiff class's settlement proceeds without due process—it had already required such result in Piambino I when it reversed the Settlement Agreement,

found absolute priority to the proceeds in the Minority Group and ordered restoration of the Rule 65 (c) bond. Piambino I at 1334.

Piambino II flowed logically from Piambino I—the Court's comments about Lead Counsel's conduct are dicta and, if erased from the Opinion entirely, would not change the holding in the slightest.

III

MAY THE COURT OF APPEALS, CONFRONTED BY THE DISTRICT COURT'S REFUSAL TO COMPLY WITH BOTH THE LETTER AND THE SPIRIT OF ITS MANDATE, ENFORCE ITS MANDATE BY MANDAMUS.

a. Mandamus

Respondent reads the Petition as alleging that Piambino I was unclear in its Mandate and therefore Mandamus was inappropriate to compel conduct not specifically required.

Piambino I is not unclear; Lead Counsel has simply and consistently refused to accept the consequences necessitated by the reversal of the preliminary injunction, Settlement Agreement and the award of attorney fees. Certainly, Piambino I directly ordered the District Court to grant Respondent's petition to intervene, Piambino I at 1334; certainly, the District Court, urged on by Lead Counsel, refused. Piambino II at 1115. While

Respondent sought to enforce the Mandate by an appeal, the Court of Appeals correctly saw the District Court's action as a refusal to enforce its Mandate. Piambino II at 1115, fn. 2

The "law of the case" directs the District Court to enforce the Mandate and the District Court:

> " . . . is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of (the) court deciding the case." *Yablonski v. UMW*, 147 US App. D.C. 193, 195, 454 F.2d 1036, 1038 (1971) *cert. denied*, 406 U.S. 906, 92 S.Ct. 1609, 31 L.Ed.2d 816 (1972) quoting *Thornton v. Carter*, 109 F.2d 316, 320 (8th Cir. 1940).

The Mandate is to be construed not solely from the summary holding, quoted by the Petition, but from the entirety of the Opinion. *Nixon v. Richey*, 513 F.2d 430, 435-36 (D.C. 1975) *affd* on other grds, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); *Cherokee Nation v. Oklahoma*, 461 F.2d 674, 678 (10th Cir.), *cert. denied*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489 (1972).

The Court of Appeals expressed no uncertainty as to the letter and the spirit of Piambino I. Respondent, in its Motion for Entry of Order on the Mandate, understood Piambino I and requested entry of the specific relief subsequently granted in Piambino II. (Appendix A).

Petitioner's narrow construction of the law of the case rule would require the Court of Appeals to specifically

instruct the District Court as to every order to be entered on remand, rather than to rely on the integrity of the District Court to carry out its intent. Such a construction would unduly burden the Court of Appeals and is inconsistent with the courteous deference and assumption of obedience inherent in our system. *U.S. v. Haley*, 371 U.S. 18, 20, 9 L.Ed.2d 1, 83 S.Ct. 11 (1962).

Petitioner's quote from Piambino I is completely misleading. Petition at 18. The Court of Appeals was not inviting further review of attorneys fees, but simply reiterating the District Court's duty to guard against conflicts of interest in approving class action settlements. The entire quote more accurately presents the Court of Appeals' position:

> "On this reasoning, the District Court abdicated its responsibility to assess the reasonableness of attorneys' fees proposed under a settlement of a class action, and its approval of the settlement must be reversed on this ground alone.
>
> On this appeal, *the parties to the settlement urge* that the record is adequately developed to enable this Court to independently evaluate the reasonableness of those fees. This is not our normal practice, however, since the District Court is infinitely better situated to conduct the factual inquiry necessary under *Johnson*, and since we are not asked to determine reasonable attorneys' fees incident to an appeal to this Court. See *Davis v. Roadway Express, Inc.*, 590 F.2d 140 (5th Cir. 1979).

> Regrettably, *this does not end the matter.* For reasons about to be stated, we must vacate in its entirety the order entering final judgment as to Bestline and 27 individual defendants." Piambino I at 1328-1329 (emphasis supplied).

Piambino I then proceeds to clearly advise all parties that, due to Lead Counsel's conflict in representing the Plaintiff class and the Minority Group, and his conduct adverse to the Minority Group, no settlement could be approved. Piambino I at 1329-1330.

Respondent has litigated this case since February, 1977; at some point, he should be able to enforce his recognized rights.

> "A litigant who, (like Respondent), has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court. In light of the prior proceedings in this matter, it is inconceivable that upon remand from this Court the (District) court was free to again impede (Respondent's) attempt to (obtain relief). Because the (District) court has refused or failed to comply with the judgment of this Court, petitioner's motion for leave to file a petition for a writ of mandamus is granted." *General Atomic Co. v Felter*, 436 U.S. 493, 497, 56 L Ed 2d 480, 98 S Ct 1939 (1978).

b. Supervisory Powers

Petitioner challenges the right of the Court of Appeals to exercise its supervisory powers to remove

Lead Counsel as attorney for the Plaintiff Class. Petition at 19. Apparently, Petitioner also views the attorney client relationship as a property right of the Petitioner. Petition at 20.

This claim touches the heart of Piambino II's holding in the proceeding below—the role of Lead Counsel is not Petitioner's property right, but is a position of public trust bestowed upon him by the District Court pursuant to Rule 23, Federal Rules of Civil Procedure. It is this unrelenting abuse of the class action vehicle for "generation of attorney fees" that prompted the Court of Appeals to remove Lead Counsel.

Piambino II expresses the great concern of the Court of Appeals at the use of Rule 23 to generate huge "strike suit" attorneys fees, rather than for its original purpose in compensating large groups of similarly situated persons for damages too small to recover on an individual basis. The adoption of Rule 23 heralded a significant experiment in redress; unfortunately, the Court of Appeals recognized the increasing abuse of this vehicle by sophisticated attorneys manipulating overworked courts. *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F. 2d 1045 (2d Cir.) *cert denied*, 414 U.S. 1092, 94 S.Ct. 722, 38 L.Ed.2d 549 (1973).

The Court of Appeals correctly perceived the situation below. Lead Counsel alleges that he generated $3,300,000 in settlement proceeds, of which he took $1,000,000 plus $105,000 in costs. Piambino I at 1316, 1327. In fact, if one subtracts the $500,000 seized from the Minority Group and the $1,036,000 obtained by the Federal Trade Commission as a civil penalty against

William Bailey, and adjusts Lead Counsel's claim of $600,000 received from the liquidation of Bestline's plant in Chicago down to the $250,000 actually netted, Lead Counsel only independently generated $1,450,000, of which Lead Counsel took $1,105,000. This is unmitigated abuse.

It is also the reason the Court of Appeals removed Lead Counsel, citing its duty to protect the integrity of the process and deal with criticism of "strike suits promoted by attorneys simply seeking fat fees". *Foster v. Boise-Cascade, Inc.*, 420 F. Supp 674, 680 (S.D. Tex. 1976), *aff'd* 577 F.2d 335 (5th Cir. 1978).

The Court of Appeals' stinging message should be fully endorsed by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

By: _____

Evelyn Langlieb Greer
Counsel for Respondent
Intervenor David Sylva
9595 North Kendall Drive
Suite 206
Miami, Florida 33176
(305) 274-8500

Appendix

[FILED APR-6 1982]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

PETER PIAMBINO, et al.,
individually, and on behalf of all
other persons similarly situated,

Plaintiffs,

v.

BESTLINE PRODUCTS, INC.,
et al.,

Defendants.

CASE NO. 73-1230-Civ-JLK
MDL NO. 162-Civ-JLK

INTERVENOR DAVID SYLVA'S MOTION FOR ENTRY OF ORDER ON THE MANDATE OF THE FIFTH CIRCUIT COURT OF APPEALS

Intervenor David Sylva, Compliance Officer of the California Restitutionary Fund, hereby requests that this Court enter an Order on the Mandate of the Fifth Circuit Court of Appeal pursuant to its decision rendered September 3, 1980, as follows:

1. As to the Motion to Intervene of Members of the California Restitutionary Fund and Motion for Designation of the Members of the California Restitutionary Fund as a Sub-Class filed February 10,

1977 (the "Motion to Intervene"), Intervenor requests that this Court:

a. Enter an Order vacating the Order Entering Final Judgment as to Defendants, Bestline Products, Inc., Bestline Corporation, et al, filed March 22, 1977 (the "Order Entering Final Judgment") which denied the Motion to Intervene;

b. Enter an Order granting the Motion to Intervene as of right and designating David Sylva, Compliance Officer of the California Restitutionary Fund, as the representative of a SubClass composed of all of the Members of the California Restitutionary Fund, for the purpose of recovering all of the settlement proceeds received by or on behalf of the Plaintiff Class as a result of the Order Entering Final Judgment;

2. As to the Preliminary Injunction entered July 7, 1976, enter an Order vacating the Preliminary Injunction and denying Plaintiff's First Motion for Temporary Restraining Order filed June 18, 1976;

3. As to the Order Entering Final Judgment, Intervenor requests that this Court:

a. Vacate, in full, the Order Entering Final Judgment;

b. Enter an Order denying approval of the Second Stipulation of Settlement filed January 28, 1977;

4. Intervenor requests that this Court carry out the intent of the Fifth Circuit Court of Appeal, which held that:

> "the District Court erred by not making the California group *whole out of the settlement proceeds*, or at least according them an *absolute priority to all such funds*. Furthermore since the (California Restitutionary members) were already entitled to such funds (up to $4,500,000. plus interest), the litigation has generated no common fund from which to pay attorneys' fees and expenses." *Supra* at

Based upon the foregoing, Intervenor requests that the Court enter an Order that:

a. all funds received by the Plaintiff Class pursuant to the Order Entering Final Judgment, being either from or for the benefit of Bestline Products, Inc. and Bestline Corporation be forthwith paid to the California Restitutionary Fund.

b. ordering each and every member of the Plaintiff Class who received funds as a result of the Order Entering Final Judgment to forthwith refund and return such funds to the Clerk of the Court under penalty of entry of an Order of Contempt against them.

c. ordering Lead Counsel to forthwith refund and return all attorneys fees and costs, plus interest, disbursed to Lead Counsel as a result of these proceedings;

d. ordering Lead Counsel and attorneys for Intervenor and Defendants to prepare a Notice to Plaintiff Class notifying the members of the Plaintiff Class of the following:

(i) The Opinion of the Fifth Circuit Court of Appeal dated September 3, 1980, reversing the Order Entering Final Judgment, reversing the Opinion and Order determining Motions for Summary Judgment and holding that all funds received by the Plaintiff Class as a result of the Order Entering Final Judgment were received by them in violation of the Modified Judgment entered by the Superior Court of the State of California.

(ii) Notifying the members of the Plaintiff Class of the Order of this Court ordering all members of the Plaintiff Class and Lead Counsel to forthwith refund in full all settlement proceeds received by them, advising the members of the Plaintiff Class that their failure to make such refund will result in the entry of an Order of Contempt against them by this Court and advising them of the consequences of the entry of such Order of Contempt against them.

5. As to the Opinion and Order determining Motions for Summary Judgment entered March 19, 1976, vacating such Order and entering an Order denying the Plaintiff's Motion for Summary Judgment.

6. Lastly, Intervenor requests entry of an Order requiring Lead Counsel to render an accounting, or furnish copies of any prior accountings, accounting for all funds received and disbursed by Lead Counsel as a result of the Order Entering Final Judgment, including an accounting as to all funds paid or received in connection with the liquidation of Bestline's plant, equipment, and other property and in carrying out the terms of the First and Second Stipulation of Settlement.

MEMORANDUM

The Opinion in *Piambino, etc. v. William E. Bailey, et al. and David Sylva*, F.2nd, (5th Circuit 1980) is explicit:

> We summarize our holdings in this case, as follows:
>
> 1. Summary judgment should not have been entered.
>
> 2. Sylva was entitled to intervention as a matter of right.
>
> 3. The attorneys' fees as proposed in the Bestline settlement should not have been approved as presented. 4.
>
> 4. The entry of an injunction against enforcement of the judgment of the California Superior Court is reversed.
>
> 5. The order entering final judgment as to Bestline and 27 individual defendants is vacated.

Intervenor David Sylva's Motion for Entry of Order on the Mandate tracks each and every one of these holdings, which require vacation and denial of the Order Entering Final Judgment dated March 22, 1977, the Preliminary Injunction dated July 7, 1976, and the Opinion and Order determining Motions for Summary Judgment dated March 19, 1976.

Further, the Fifth Circuit clearly stated its determination that the members of the California Restitutionary Fund, represented by Intervenor David

Sylva, were entitled to *absolutely priority to all funds* obtained by the Plaintiff Class as a result of this litigation; in fact, the Fifth Circuit calculated that the sum of $4,500,000.00, plus interest, was due to the members of the California Restitutionary Fund as of the date of its Order, and reasoned as follows:

> The participants in the California fund all had judgments that were entitled to full faith and credit under Article IV of the Constitution and 28 U.S.C. s.1738. As the amicus brief filed by the State of Wisconsin indicates, those 7,043 people waived their rights to pursue any claims against Bestline, either as part of their judgments or upon joining the California fund. Unless those waivers were somehow not entitled to full faith and credit, it would seem that those 7,043 people never should have been included in the class. The record on appeal does not permit us to rule definitively on this point, however, and we shall assume that the California fund participants constituted a subclass in this litigation. Unless it was proper for the District Judge to enjoin Bestline from complying with those judgments, a question which is answered in the negative in part VI of this opinion, the District Court erred by not making the California group *whole out of the settlement proceeds, or at least according them an absolute priority to all such funds.* Furthermore, since those 7,043 people were already entitled to such funds (up to $4,500,000 plus interest), *this litigation has generated no common fund from which to pay attorneys' fees and expenses.*

> Thus, the result which we reach, by assuming that the 7,043 California fund participants were properly included in the class as defined by the District Court, *is the same* as that which would have been reached if those persons had not been included in the class and if the preliminary injunction had not issued. By concluding that those persons are entitled to settlement proceeds up to $4,500,000 plus interest, they are placed in the same position they would have been if Bestline had made all the scheduled payments to the trustee. If, however, Bestline would have defaulted on those payments before now, the California class would still have obtained Bestline's assets through liquidation long before this settlement.
>
> Therefore, the order approving the Bestline settlement and entering final judgment as to the subscribing defendants is vacated in its entirety.

The funds seized pursuant to the Preliminary Injunction, the funds paid by Bestline or for the Benefit of Bestline as a result of the Order Entering Final Judgment and all funds obtained by the Plaintiff Class as a result of liquidation of Bestline property, are the absolute property of the members of the California Restitutionary Fund, based upon the Fifth Circuit's holding that it is this Court's obligation to accord "absolute priority" to the members of the California Restitutionary Fund in distribution of any settlement proceeds.

Intervenor requests establishment of a subclass comprised of the members of the California Restitutionary

Fund not for the purpose of pursuing substantive claims against Defendants in this action, but for the limited purpose of recovering all of the settlement proceeds obtained by the Plaintiff Class or their representatives as a result of settlement of their claims against Bestline Products, Inc. and Bestline Corporation.

The Fifth Circuit certainly indicated that the waivers executed by the members of the California Restitutionary Fund precluded, or upon submission of additional evidence would probably preclude, their asserting old or new claims against these Defendants. However, the Fifth Circuit directed that the same result be achieved whether or not the members of the California Restitutionary Fund were excluded from this action and continued to receive the Restitutionary Fund payments due under the Modified Judgment entered in the Superior Court of the State of California, exclusive of interference from the claims of the Plaintiff Class, or executed on the funds collected by the Plaintiff Class as a claim by a prior judgment creditor entitled to full faith and credit. Regardless, the Fifth Circuit held that the members of the California Restitutionary Fund were entitled to absolute priority dollar for dollar to the funds collected by the Plaintiff Class, particularly in view of the destruction of the Restitutionary Fund payment plan through the Preliminary Injunction and through the Second Stipulation of Settlement, which dismantled and liquidated Bestline Corp. and terminated its ability to make payments to the California Restitutionary Fund.

In order to effectuate the retrieval and repayment of the settlement proceeds, it is obviously necessary for Intervenor to be a party to this action. Intervenor now understands that motions have been filed to strike

the name of his counsel from the attorney mailing list in this matter, and indeed no pleadings have been received by counsel for Intervenor since the rendering of the decision of the Fifth Circuit Court of Appeals. Clearly, Intervenor cannot protect the interests of the Plaintiff SubClass members of the California Restitutionary Fund without participating in this action and overseeing the retrieval of the settlement proceeds and their payment to the California Restitutionary Fund. The designation of Intervenor David Sylva as a class representative of the Sub-Class composed of the members of the California Restitutionary Fund is specifically mandated by the Fifth Circuit Opinion, and is obviously necessary to the conclusion of this litigation.

By recognizing Intervenor as a representative of the members of the California Restitutionary Fund for the purpose of collecting the settlement proceeds and paying them into the California Restitutionary Fund, the intent of the Fifth Circuit opinion is carried out in the most practical fashion.

The Fifth Circuit was not unaware of the practical difficulties resulting from its decision. During the oral argument before the Fifth Circuit, Lead Counsel made the Fifth Circuit panel acutely aware that the settlement proceeds and attorneys' fees and costs had been promptly disbursed both to the Plaintiff Class and to Lead Counsel, and that reversal of the Order Entering Final Judgment meant having to retrieve these funds from thousands of members of the Plaintiff Class and from Lead Counsel. The Fifth Counsel acknowledged this situation in its Opinion, by referring to the issuance of the checks for payment of attorneys' fees to Lead Counsel as "execution"; indeed, the Fifth Circut was aware that such execution

had been accomplished even before counsel for Intervenor David Sylva received a copy of this Court's Order Entering Final Judgment.[1]

It is now the sole responsibility of the Plaintiff Class, through Lead Counsel, to recover and repay to this Court all funds disbursed by this Court pursuant to the Order Entering Final Judgment. The obligation of Plaintiff Class and Lead Counsel to repay these sums is an obligation due to this Court, and Intervenor has proposed a method of recovery and the imposition of sanctions, if necessary. Upon receipt by this Court of the settlement proceeds, such sums must be disbursed by this Court in accordance with the decision of the Fifth Circuit—directly to the California Restitutionary Fund.

Wherefore, Intervenor David Sylva respectfully requests that the Orders required by the Opinion of the Fifth Circuit Court of Appeals and requested in this Motion be entered, and that this Court and all parties proceed with due haste to retrieve the settlement proceeds in full and pay them to the California Restitutionary Fund.

---

[1]Apparently this Court notified the Fifth Circuit Court of Appeals that no Motion for Stay or Supersedeas had been filed before this Court; however, the record on appeal contained Intervenor's Motion to Stay Disbursement of Plaintiff's Attorney's Fees and For Stay of Order Entering Final Judgment and Memorandum in Support fixed April 1, 1977; simultaneousiy Intervenor posted a Supersedeas Bond in the amount of $500.00 and requested that this Court accept such Supersedeas and stay disbursement of funds. On April 29, 1977 this Court entered an Order Denying Intervenor's Motion to Set Aside Disbursement of Plaintiff's Attorney Fees and for Stay of Order Entering Final Judgment.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 5 day of April 1982 to all the parties on the attached list.

/s/ Evelyn Langlieb Greer

Evelyn Langlieb Greer, P.A.
Attorney for Intervenor-Appellant
9595 North Kendall Drive
Suite 205
Miami, Florida 33176
Telephone: (305) 274-8500